



# **OPRA Challenges & Opportunities for Custodians**

**Presented by the Government Records Council**

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# Municipal Custodians

- Clerk is Single Point of Contact for any request
- Clerk's can delegate custodian responsibilities to deputies and sub-custodians
- Responsibility transfers to anyone with responsibility to fulfill
- Penalties go to person responsible
- Central tracking for some departments may be useful

# Records Request and Forms

- Use of form cannot be required – only required to be available
- Letter requests should include all information to fulfill it.
- Denials still must provide an explanation and rights notice

# OPRA vs. Non OPRA request

- Routine requests do not require formal request: custodian option; i.e.,
  - Tax searches, tax status
  - Police accident reports
  - Vital statistics
  - Minutes
- Records requested in normal course of daily activities do not have to be considered OPRA
- Do not have to charge for common documents
- Be consistent on requests and charges

# Fee Issues

- Ordinances set fee if basic fee for printed material exceeds 75/50/25 statute
- Otherwise, it's the cost of making the copy
- Special service charge for extraordinary & requests
  - Direct cost of staff to locate and prepare for inspection. Redaction is possible.
  - Routine is not extraordinary
- SSC permitted for extraordinary costs of inspection requests (AG Advice)
- Can charge per copy costs for faxing and per copy for double sided copies

# To Pay or Not Pay

- Elected officials do not have to pay for official business copies; but must comply with confidentiality requirements
- Freebies ok – if consistent to all comers
- E-mailed files are free – no basis for charging

# Denials of Access

- Requests can be denied if:
  - An exception
  - Incomplete requests
  - Request that is not a record – information
  - Record to be created
- Must still respond
  - If more than seven days, respond and indicate when there will be a response

# When Denying Access...

- State the appropriate exception
- Explain the reason for it if not self-evident
- ACP and ACD privileges must have explain why redactions are attorney-client or deliberative process privileged
- Deny for correct reasons, check with attorney to be sure
- Document your communications
- Be prepared for complaint



# Redacting Exempt Records

- Copy...black out...cover up...then copy again. Or use post-it and copy.
- Cannot charge for intermediate copy
- Show the redaction – important on electronic documents
- Charging for redaction – it has to be extraordinary

# When a complaint is filed...

- Make sure your attorney knows about it
- Treat it seriously
- Try to resolve it
- Respond to the Statement of Information timely with all facts
- Respond to the Preliminary Findings and Recommendations

# Personal information

- Names, addresses, and phone numbers: all disclosable unless a law says not to.
- Animal control records: yes unless phone number is declared to be unlisted
- E-mail addresses: at the moment, yes
  - We are looking at them in context of voluntary submission of them.
- Privacy commission is also examining names and addresses
- NO release of employee home addresses or phone numbers

# Other Requests

- “Serial” requesters. Contact us with specifics
- Anonymous requests: permitted, can only require a deposit if cost more than \$5.00.
- Government cannot ask the reason why information is requested
- Records may not be “information” – do not have to perform calculations for requesters
  - But offer the base records if appropriate

# Other Issues

- Construction plans – disclosable except for clear issues that are security related
- Budget workbooks – only the final set of documents that represent the final budget.
- W-2's: only gross salary and name; no deduction information; try to provide other information
- Insurance information: non-personally identifiable fiscal records

# Coming Soon...

- AG advice on fees and how municipalities can change them
- Formal notice on not requiring use of form
- Prevailing party attorney fee guidance
- Updated inquiry and complaint process
- Formal construction plan guidance

# GRC and Court Cases

# GRC Case Lessons

- Prevailing party only if Council decides; fee calculation not yet resolved
- Don't interpret requests –
  - Address the specific request. Don't second guessing or substituting what you think a requester wants without getting agreement first
- Just because something is in personnel file does not mean its protected.
  - Disclosure allowed for non-personnel related items
- Extraordinary:
  - One hour programming fee and computer time charge is not extraordinary for a routine request.



# OPRA 9-1-1 Court Lessons

- 9-1-1 is disclosable, but..
- Some cases may raise an issue of privacy rights, entitling a party to the call, but not to the complaint standing to argue against disclosure.
  - But, it's still uncertain; call attorney
- Judges can issue protective orders in a criminal case
- Independent rescue squad (or volunteer fire) information is not disclosable

# Other Lessons

- Extraordinary fees:
  - Fees must be kept as low as possible; not highest price workers
  - Extraordinary could not be set in stone; its case by case
  - Vouchers should not contain privileged material
- NJ for Death Penalty Moratorium v. Department of Corrections
  - Good description of what ACD is: pre-decisional but not factual
- Common law cannot be used by agencies to withhold records

# Some Conclusions and Reminders

# Things to Remember

- Following properly applied GRC advice is good defense against charge of “knowingly and willfully” violating OPRA
- Don’t block access; assist in getting it, and make sure disclosure complies with OPRA
- Can’t require use of local form
- Review denials with attorney

# Intent of the Law is Greater Access to Public Records

- It's about making access available: don't make it more difficult by adding barriers
- Train staff, department heads and agency attorney
- Delegate responsibility where necessary
- Make commonly requested records available in the office, online or at library

# OPRA Best Practices

- Provide responses as soon as possible
- Keep it simple
- Get meeting minutes current and keep closed session up to date
- Don't bounce people around
- Don't try to get even
- If you deny access... let your attorney know
- Refer to GRC references